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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 13

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION
and
RAYMOND J. WISE, an individual, *Appellees*

## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

## MOTION TO DISMISS OR AFFIRM

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

NO. 173

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v.

NATIONAL DAIRY PRODUCTS CORPORATION
and
RAYMOND J. WISE, an individual, *Appellees*

## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

## MOTION TO DISMISS OR AFFIRM

Appellees move, pursuant to paragraph 1 a of Rule 16 of the Revised Rules of this Court, that the Appeal herein be dismissed, and as grounds therefore state: (A) the Jurisdictional Statement (hereafter cited "J.S.") violates paragraph 1 (c) (2) of the Court's Rules 15, because the substance of the question presented has been changed from that set forth in the Notice of Appeal and appellees have been prejudiced thereby; (B) the Jurisdictional Statement violates paragraph 1 (c) (1) of Rule 15 because it does not deal with the question presented by the Notice of Appeal

and because the new question is not "expressed in the terms and circumstances of the case."

In the alternative appellees move, pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

## QUESTION PRESENTED

The question presented on the record in this case, correctly stated in the Notice of Appeal, is whether the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is so vague as to make its enforcement as a criminal statute unconstitutional. In the Jurisdictional Statement, however, the Solicitor General has abandoned the Government's defense of the statutory language and has substituted a question new to these proceedings, that is, whether the disputed clause is fatally vague and indefinite "as applied to sales made below cost" (J.S. 2).

## GROUNDS FOR DISMISSAL: FAILURE TO COMPLY WITH THE COURT'S RULES

### A. The Change in the Question Presented Is Substantial and Prejudices Appellees

Had the Notice of Appeal revealed the intention to innovate on appeal an interpretation of the indictment not offered below, we would have designated those portions of

the record showing unequivocally the novelty of that interpretation. But the "question presented" was changed after the record had been designated in accordance with the question argued to the district court. This substantial shift in position has prejudiced appellees by precluding designation, for example, of the Government's brief below opposing our motion to dismiss the Robinson-Patman counts. Although that brief, which was relied upon by the district court (R. 163), contains the detailed and comprehensive statement of the Government's position, it does not assume or assert the indictment to delimit a "below cost" fact situation.

### B. The New Question Is Unrelated to the Terms and Circumstances of the Case

Even if the new question had been properly presented in the Notice of Appeal, it would be subject to dismissal because it is not the question presented by the record in this case.

It is settled that "if on its face the challenged provision is repugnant to the due process clause [in that it is so vague as not to give notice of what conduct is prohibited], specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and

warns against transgression." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).[1]

Thus Government counsel below had no alternative at law but to defend the statute on its face. Moreover, on the basis of the indictment itself they could have taken no other position. Each Robinson-Patman count contains a paragraph charging, in the exact words of the statute, sales at unreasonably low prices for the purpose of destroying competition (Paragraphs 22, 34, 46, 58, 70, 92, 104; R. 9, 13, 16, 20, 24, 31, 35; see J.S. 4). Although subsequent paragraphs give notice that one kind of evidence the Gov-

[1] With one exception the cases cited for the contrary proposition (J.S. 6) do not involve statutes challenged for vagueness. In that one, *United States* v. *Harriss*, 347 U.S. 612 (1954), the irrelevance of the terms of the information was a point on which the majority and minority were agreed. Speaking for the majority, Mr. Chief Justice Warren wrote (347 U.S. at 617):

> "Our review . . . is limited to a decision on the alleged 'invalidity' of the statute on which the information is based. In making this decision, *we judge the statute on its face*. See *United States* v. *Petrillo*, 332 U.S. 1, 6, 12." (Emphasis added.)

Similarly, for the minority Mr. Justice Douglas concluded that "the question . . . is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning." 347 U.S. at 629.

(In *Jordon* v. *DeGeorge*, 341 U.S. 223 (1951) the majority did not view vagueness as the issue (341 U.S. at 229) but, turning to that question in deference to the minority, held that the case fell into a general category of activity clearly described by the statutory words, not vice versa (341 U.S. at 232).)

ernment hopes to adduce is of sales knowingly made at "prices below [appellee National's cost," on the basis of this indictment there is nothing whatsoever to indicate that the evidence would be limited to such prices, nor did Government trial counsel ever suggest that they recognize such a limitation or consider it acceptable. On the contrary, counsel below fully recognize that the indictment, repeating verbatim the disputed statutory clause, is as broad — and as vulnerable — as the statute itself (see R. 150-152).

Accordingly, the "question presented" by the Jurisdictional Statement is not "expressed in the terms and circumstances" of this case. We submit that the Government's failure to comply with the Rules of this Court is "sufficient reason for dismissing the appeal" (Rule 10, Paragraph 2(c)).

## GROUNDS FOR AFFIRMANCE: THE QUESTION IS UNSUBSTANTIAL

### A. The Constitutional Principles Applicable to the Appeal Are Settled and Require Affirmance of the Judgment Below.

In a case of first impression the constitutional issue posed by the Appeal could not be called unsubstantial. At this juncture, however, it presents no novel or doubtful question. The criminal proscription against "unreasonably low prices," struck down by the court below, is in substance identical to the Lever Act (prohibiting the wilful and felo-

nious making of unreasonable rates and charges for necessities) which the Court voided because it did not provide "an ascertainable standard of guilt . . . adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." *United States* v. *L. Cohen Grocery Company*, 255 U.S. 81, 89 (1921).

The *Cohen* precedent is not isolated nor outmoded. The Court reached the same conclusion with respect to legally indistinguishable criminal statutes in *International Harvester Company* v. *Kentucky*, 234 U.S. 216 (1914) ("market value under fair competition, and under normal market conditions"); *Collins* v. *Kentucky*, 234 U.S. 634 (1914) (same); *Cline* v. *Frink Dairy Company*, 274 U.S. 445 (1927) ("reasonable profits"); *Connally* v. *General Construction Company*, 269 U.S. 385 (1926) ("current rate of per diem wages in the locality"). Recently it recognized the current validity of this line of decisions as pertinent to the "unreasonably low prices" clause. Characterizing that clause as "this vague provision," Mr. Justice Harlan observed (*Nashville Milk Co.* v. *Carnation Company*, 355 U.S. 373, 378 (1958)):

> "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-856."

Indeed, "doubts besetting [the provision's] constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 201 (1955).

Here, as below, the Government would divert attention from the determinative fact that the challenged clause "forbids no specific or definite act" *United States* v. *L. Cohen Grocery Company*, 255 U.S. 81, 89 (1921)) by leaping to discussion of the motive for the still inscrutable deed. But "legislation may run afoul of the Due Process Clause [not only] because it fails to give adequate guidance to those who would be law-abiding, but also because it fails to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser* v. *Utah*, 333 U.S. 95, 97 (1948); see also *United States* v. *Cardiff*, 344 U.S. 174, 176 (1952); *Winters* v. *New York*, 333 U.S. 507, 515-516 (1948). It is with respect to the nature of the crime and, as the district court could readily appreciate, the guidance to trial courts, that the "unreasonably low prices" clause is most obviously deficient.

*Screws* v. *United States*, 325 U.S. 91 (1945), relied upon by the Government, shows explicitly and emphatically that a particular intent, even criminal scienter, can-

not fulfill the requirements of due process where "no overt act is laid" (*Nash* v. *United States*, 229 U.S. 373, 378 (1913)): "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient [325 U.S. at 103] . . . willful conduct cannot make definite that which is undefined." 325 U.S. at 105.[2]

Particularly should this cogent admonition be observed here where the motive made suspect by the statute is not patently culpable (cf. *Screws* v. *United States*, 325 U.S. 91 at 96, 101 (1945)) but differs only in indeterminate degree from the normal competitive motive on which our free economy is premised. Note, 100 U. of Penn. L. Rev. 1058, 1062 (1952); Comment, 55 Mich. L. Rev. 845, 854-855 (1957); cf. Edwards, Maintaining Competition 162 (1949) ("Any concern that reduces prices probably does so principally in the hope of taking some business away from competitors. . . . Local price reductions . . . are . . . to be expected, even though the concern instituting them is not cracking the whip over its competitors"); Clark, "Statutory Restrictions on Selling Below Cost," 11 Vand. L. Rev. 105, 113-119 (1957); Note, 9 Intra. L. Rev. (N.Y.U.) 239, 244 (1954).

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[2] Were the law otherwise, the *Cohen* statute could also have been saved; in *Cohen* as in *Screws* the statute involved required that the wrongdoing be "wilful", the difference being that in *Screws* the forbidden act was "made definite by [reference to] decision or other rule of law . . ." 325 U.S. at 103, 96.

By consistent construction of the phrase "unreasonably low prices" to mean "sales below cost" the Jurisdictional Statement implicitly acknowledges that, regardless of any specification of intent, the "unreasonably low prices" clause, if judged on its face, must fall (see J.S. 11). Thus in effect the Government concedes the correctness of the decision it is asking this Court to hear and reverse.

### B. The Construction Urged in the Jurisdictional Statement Would Result in Legislation by the Court

Since, as we have shown (*supra*, pp. 2-5), there is no legal or factual basis for the "below cost" limitation urged by the Government, it is apparent that the Court is being asked capriciously to construe "unreasonably low prices" to mean "prices below cost." This is not suggested as a connotation of the statutory language; rather it is offered as a putative derivation from legislative history (J.S. 9).

We know of no case in which this Court has looked to legislative history (as it might were the words merely ambiguous) to give definiteness to a statute on its face "void for vagueness." But should the Court do so here, it would find only that the fragmentary selections offered in the Jurisdictional Statement (at p. 9) are, if possible, more vague than the clause itself.[3]

[3] Nor do they tend to support the proposition for which they are cited; indeed, one reference is to the testimony of a small businessman who averred that sales "below cost" are often normal

We submit that if Congress had meant "prices below cost" it would have said so. Contrast *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). The very different language actually used suggests both that Congress had in mind some criterion other than "cost," i.e., "unreasonableness," and that it did not consider all prices "below cost" to be "unreasonable." Therefore the construction urged by the Government would violate the Congressional intent; its adoption would amount, contrary to the fixed principles of this Court, to judicial legislation.[4]

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and necessary economic behavior. PRICE DISCRIMINATION, HEARINGS BEFORE SUBCOMMITTEE OF SENATE JUDICIARY COMMITTEE ON S. 4171, 74th Cong., 2nd Sess., p. 53. "[T]he Borah-Van Nuys amendment [which became the section that includes the "unreasonably low prices" clause] resulted from the inability of the Senate to agree on policy when confronted with the conflicting demands of independents, manufacturers, and mass distributors." PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 228, 231 (1955).

[4] It should be noted that such legislation would be extremely controversial. "Cost" is itself a vague and unworkable standard. The Court in connection with other sections of the Robinson-Patman Act has acknowledged the "elusiveness of cost data" (346 U.S. at 68) and, in the absence of a clear Congressional directive, has resisted imposing the burden of such proof or disproof on defendants, even in civil actions. *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U.S. 61 (1953). Accountants, belying Judge Yankwich's thesis that "cost accountancy has reached the exactness of a science" (*F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189 (D.C.S.D. Calif. 1951)), are in accord. REPORT TO THE FEDERAL TRADE COM-

### C. The Appeal Presents No Important Federal Question

The *Nashville* case settled that, whether or not constitutional, the challenged clause will not support a private action. The Court, after commenting on its doubtful constitutionality, found it "worthy of note that the Department . . . has never, so far as we have been able to determine, brought proceedings under this provision . . ." *Nashville Milk Co.* v. *Carnation Company*, 355 U.S. 373, 378 (1958). This the Government concedes (J.S. 11); indeed, so far as we can find, in the 23 years to the time of the filing of the indictment in this case, the Department made virtually no use of it. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 199-

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MISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION (1956); cf. Note, 100 U. OF PENN. L. REV. 1059, 1061 (1952). Most of the state legislatures that have enacted "sales below cost" statutes have found it necessary to define "cost," and to do so rather arbitrarily. CLARK, "Statutory Restrictions on Selling Below Cost," 11 VAND. L. REV. 105, 119-125 (1957). Economists do not talk generally of "cost" but distinguish precisely among many kinds of costs, each of which may, but usually does not—depending on a host of factors such as the time period involved, the play of supply and demand, the efficiency of the particular competitor, the liquidity of assets, the state of inventories, technological development, seasonal variations, the type of business involved—have a recognizable relationship to a given price. Cf. "Report of Sherman Act Subcommittee on Cost Data Problems in Sherman Act Cases," 17 ABA: SECTION OF ANTITRUST LAW 519, 525, 1960); EDWARDS, MAINTAINING COMPETITION 162 (1949).

200 (1955); Note, 103 U. of Penn. L. Rev. 116, 122 (1959).

We do not suggest that disuse determines unconstitutionality. But certainly it implies unworkability (contrast *United States* v. *Ragen*, 314 U.S. 513, 523-524 (1942)) and consequent unimportance as an instrument of public policy.[5] The Appeal presents therefore, no controversy of far reaching significance but simply an attempt to test the Department's right to use a provision for which it has not before found any real use, an attempt possibly inspired by the Court's recent warning of doubtful constitutionality.

## CONCLUSION

For the reasons stated, appellees respectfully urge that the Appeal be dismissed. In the alternative, as the question presented is unsubstantial, appellees submit that the judg-

[5] If, as the Government without substantiation asserts (J.S. 11), the clause has been a significant deterrent, it may well have been in the direction of price rigidity, thus undermining the public antitrust policy. Note, 100 U. of Penn. L. Rev. 1058, 1062 (1952); cf. *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U.S. 61, 74 (1953). The Attorney General's Committee concluded that "it does not serve the public interest of antitrust policy." Report of the Attorney General's National Committee to Study the Antitrust Laws 201 (1955).

ment of the district court should, without further argument, be affirmed.

Dated: July 26, 1961

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